

a technically defensible and timely manner, seek assistance as appropriate, and annually review the progress being made on implementation; and

(b) *Technical assistance from others* In carrying out the provisions of this part, NRCS may request technical assistance from the U.S. Fish and Wildlife Service, State or local agencies, conservation districts, or qualified private entities when NRCS determines that additional staff resources or technical expertise are needed to address adequately the requirements of this part or to enhance the quality of implementation of this part.

(c) *Certification of wetland determinations and wetland delineations.* (1) Certification of a wetland determination means that the wetland determination is of sufficient quality to make a determination of ineligibility for program benefits under §12.4 of this part. NRCS may certify a wetland determination without making a field investigation. NRCS will notify the person affected by the certification and provide an opportunity to appeal the certification prior to the certification becoming final. All wetland determinations made after July 3, 1996, will be done on a tract basis and will be considered certified wetland determinations. A not-inventoried designation within a certified wetland is subject to change when the soil, hydrology, and vegetation evaluation is completed and identified as to type of wetland or as a non-wetland. This change from a not-inventoried designation to an approved wetland designation will be done at the request of the landowner or during a formal investigation of a potential violation.

(2) The wetland determination and wetland delineation shall be certified as final by the NRCS official 30 days after providing the person notice of certification or, if an appeal is filed with USDA, after the administrative appeal procedures are exhausted.

(3) In the case of an appeal, NRCS will review and certify the accuracy of the determination of all lands subject to the appeal to ensure that the subject lands have been accurately delineated. Prior to a decision being rendered on

the appeal, NRCS will conduct an on-site investigation of the subject land.

(4) Before any benefits are withheld, an on-site investigation of a potential wetland violation will be made by NRCS. The affected person will be provided an opportunity to appeal the on-site determination to USDA if the on-site determination differs from the original determination. Such action by NRCS shall be considered a review of the prior determination and certification of the delineation. If the prior determination was a certified wetland determination, an appeal of the NRCS on-site determination shall be limited to the determination that the wetland was converted in violation of this part.

(5) A copy of the information from the final certified wetland determination and the wetland delineation shall be recorded on official USDA aerial photography, digital imagery, or other graphic representation of the area.

(6) As long as the affected person is in compliance with the wetland conservation provision of this part, and as long as the area is devoted to the use and management of the land for production of food, fiber, or horticultural crops, a certification made under this section will remain valid and in effect until such time as the person affected by the certification requests review of the certification by NRCS. A person may request review of a certification only if a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, or if NRCS concurs with an affected person that an error exists in the current wetland determination.

[61 FR 47025, Sept. 6, 1996; 61 FR 53491, Oct. 11, 1996; 76 FR 22785, Apr. 25, 2011]

#### **§ 12.31 On-site wetland identification criteria.**

(a) *Hydric soils.* (1) NRCS shall identify hydric soils through the use of published soil maps which reflect soil surveys completed by NRCS or through the use of on-site reviews. If a published soil map is unavailable for a given area, NRCS may use unpublished soil maps which were made according to the specifications of the National

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Cooperative Soil Survey or may conduct an on-site evaluation of the land.

(2) NRCS shall determine whether an area of a field or other parcel of land has a predominance of hydric soils that are inundated or saturated as follows:

(i) If a soil map unit has hydric soil as all or part of its name, that soil map unit or portion of the map unit related to the hydric soil shall be determined to have a predominance of hydric soils;

(ii) If a soil map unit is named for a miscellaneous area that meets the criteria for hydric soils (i.e., riverwash, playas, beaches, or water) the soil map unit shall be determined to have a predominance of hydric soils; or

(iii) If a soil map unit contains inclusions of hydric soils, that portion of the soil map unit identified as hydric soil shall be determined to have a predominance of hydric soils.

(3) *List of hydric soils.* (i) Hydric soils are those soils which meet criteria set forth in the publication “Hydric Soils of the United States 1985” which was developed by the National Technical Committee for Hydric Soils and which is incorporated by reference. This publication may be obtained upon request by writing NRCS at U.S. Department of Agriculture, P.O. Box 2890, Washington, DC 20013, and is available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html). Incorporation of this publication by reference was approved by the Director of the Federal Register on June 24, 1986. The materials are incorporated as they exist on the date of the approval and a notice of any change in these materials will be published in the FEDERAL REGISTER.

(ii) An official list of hydric soil map units shall be maintained at the local NRCS office and shall include—

(A) All soils from the National List of Hydric Soils that can be found in that field office area, and

(B) Any soil map units or areas which the state conservationist determines to meet such hydric soil criteria.

(iii) Any deletions of a hydric soil unit from the hydric soil map unit list

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must be made according to the established procedure contained in the publication “Hydric Soils of the United States 1985” for adding or deleting soils from the National List of Hydric Soils.

(b) *Hydrophytic vegetation.* Hydrophytic vegetation consists of plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(1) A plant shall be considered to be a plant species that occurs in wetland if such plant is listed in the National List of Plant Species that Occur in Wetlands. The publication may be obtained upon request from the U.S. Fish and Wildlife Service at National Wetland Inventory, Monroe Bldg. Suite 101, 9720 Executive Center Drive, St. Petersburg, Florida 33702.

(2) For the purposes of the definition of “wetland” in §12.2 of this part, land shall be determined to have a prevalence of hydrophytic vegetation if:

(i) NRCS determines through the criteria specified in paragraph (b)(3) of this section that under normal circumstances such land supports a prevalence of hydrophytic vegetation. The term “normal circumstances” refers to the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed; or

(ii) In the event the vegetation on such land has been altered or removed, NRCS will determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions.

(3) The determination of prevalence of hydrophytic vegetation will be made in accordance with the current Federal wetland delineation methodology in use by NRCS at the time of the determination.

(c) *Mitigation wetlands.* Notwithstanding the provisions of this section, wetlands which are created in order to mitigate the loss of other wetlands as a result of irrigation, recreation, municipal water, flood control, or other similar projects shall not be considered to be artificial wetland for the purposes of §12.5(b)(1)(vii)(A) of this part.

(d) *Minimal effect determination.* For the purposes of §12.5(b)(1)(v) of this part, NRCS shall determine whether the effect of any action of a person associated with the conversion of a wetland, the conversion of wetland and the production of an agricultural commodity on converted wetland, or the combined effect of the production of an agricultural commodity on a wetland converted by someone else has a minimal effect on the functions and values of wetlands in the area. Such determination shall be based upon a functional assessment of functions and values of the wetland under consideration and other related wetlands in the area, and will be made through an on-site evaluation. A request for such determination will be made prior to the beginning of activities that would convert the wetland. If a person has converted a wetland and then seeks a determination that the effect of such conversion on wetland was minimal, the burden will be upon the person to demonstrate to the satisfaction of NRCS that the effect was minimal.

The production of an agricultural commodity on any portion of a converted wetland in conformance with a minimal-effect determination by NRCS is exempt under §12.5(b)(1)(v) of this part. However, any additional action of a person that will change the functions and values of a wetland for which a minimal-effect determination has been made shall be reported to NRCS for a determination of whether the effect continues to be minimal. The loss of a minimal effect determination will cause a person who produces an agricultural commodity on the converted wetland after such change in status to be ineligible, under §12.4, for certain program benefits. In situations where the wetland values, acreage, and functions are replaced by the restoration, enhancement or creation of a wetland in accordance with a mitigation plan approved by NRCS, the exemption provided by the determination will be effective after NRCS determines that all practices in a mitigation plan are being implemented.

(e) *Categorical Minimal Effect Exemptions.* (1) The state conservationist, in consultation with the state technical committee established under 16 U.S.C.

3861, shall identify any categories of conversion activities and conditions which are routinely determined by NRCS to have minimal effect on wetland functions and values, as described in paragraph (d) of this section, and recommend to the Chief, NRCS, or a designee, inclusion on a list of categorical minimal effect exemptions.

(2) The Chief, or designee, shall evaluate the conversion practices recommended by the state conservationists in the region to ensure consistency across State and regional lines, and to determine whether any categories of conversion activities identified pursuant to paragraph (e)(1) of this section, if such activities were exempt from the ineligibility provisions of §12.4, would only have a minimal effect on wetland functions and values in a wetland system within the region.

(3) Any categories of conversion activities which meet the criteria of paragraph (e)(2) of this section will be published in the FEDERAL REGISTER for inclusion in this part and shall be exempt under §12.5(b)(1)(v) of this part.

(4) The NRCS local field office shall maintain a list of any activities and conditions which are determined by the Chief, or designee, exempt pursuant to this section and will provide the list to a person upon request.

[61 FR 47025, Sept. 6, 1996, as amended at 69 FR 18803, Apr. 9, 2004; 76 FR 82077, Dec. 30, 2011]

#### **§ 12.32 Converted wetland identification criteria.**

(a) Converted wetland shall be identified by determining whether the wetland was altered so as to meet the definition of converted wetland. In making this determination, the following factors are to be considered:

(1) Where hydric soils have been used for production of an agricultural commodity and the effect of the drainage or other altering activity is not clearly discernible, NRCS will compare the site with other sites containing the same hydric soils in a natural condition to determine if the hydric soils can or cannot be used to produce an agricultural commodity under natural